Sam Maark a/l Verak v Dato' Zainal Abidin bin Ahmad & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-742–12 OF 2019
HANIPAH FARIKULLAH, LEE SWEE SENG AND DARRYL GOON JJCA
27 JANUARY 2022

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Administrative Law — Dismissal from service — Judicial review — Appeal against High Court's decision in dismissing judicial review application against decision of Public Services Commission — Whether charges against appellant defective — Whether there was procedural impropriety due to failure to conduct internal inquiry — Whether evidence of witnesses in support of appellant's case was not given adequate consideration — Whether there was need for investigation committee to be established — Whether there was illegality, procedural impropriety or irrationality — Whether punishment meted out by Public Services Commission proportionate — Public Officers (Conduct and Discipline) Regulations 1993 reg 37(5) — Rules of Court 2012 O 53 r 3(2)

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The appellant was a civil servant holding the position of Deputy Directors of Customs, grade WK44 (acting) in the Royal Malaysian Customs Department. The appellant was dismissed from service by the Public Services Commission as he was found guilty of three charges ie absent from duty without leave, failed to register movement in and out of the office, and came late to the office and leaving early from the office without permission. The appellant's application for judicial review was dismissed by the High Court, hence, the present appeal. The appellant submitted that: (a) the charges were defective because the number of days stated in the charges were not all proven; (b) there was no internal inquiry as required under regs 6.1.2 and 6.1.4 of the general orders 'Perintah Am Bil 177 — Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja' dated 13 March 2017 ('the general orders'), as such, there was procedural impropriety; (c) the appellant's supervisors' views in supporting the fact that the appellant's duties involved being out of the office were not considered or given adequate consideration; (d) it was clear from the evidence that the appellant had left his office to carry out his duties on instructions given, as such, pursuant to reg 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations 1993'), it was necessary that an investigation committee be established to investigate the issue; and (e) the punishment meted out was disproportionate.

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Held, dismissing the appeal with costs:

(1) There was no logical or rational basis why the charges may be said to be defective merely because the total number of days the appellant was found to have been absent from duty or had failed to record his attendance did not match the exact number of days set out in the charges. The Chairman of the Public Services Commission in his affidavit had candidly disclosed that the total number of days were fewer than those presented in the charges. This indicated that there was sufficiently careful consideration of the charges presented without which these findings could not have been made (see paras 41–42).

(2) Regulation 6 of the general orders was headed 'Pemantauan'. The general orders were clearly for the purpose of monitoring. However, nowhere was it suggested that there was a need for an internal inquiry before disciplinary action may be taken. It also could not be the case that should there be a failure of a supervising officer to invoke reg 6.1.4, disciplinary action may therefore never be taken. The disciplinary provisions under the Regulations 1993 and the general orders were two discrete sets of regulations. Neither was conditional upon the other being first invoked (see paras 46 & 48).

(3) There was no need for a committee of investigation to be constituted under reg 37(5) of Regulations 1993. It was quite clear that reg 37(5) was designed to assist the disciplinary tribunal if it was of opinion that the case against the officer concerned required further clarification. In the present case, the evidence of the appellant's failure to record his attendance and time of arrival and departure from work were supported by the appellant's service record book and the entries therein and the attendance report based on a record book. The defences provided by the appellant were either not corroborated or did not justify his absence from duty or his failure to record the time of his arrival at and leaving the office (see paras 49 & 53).

(4) No evidence of any specific instructions was provided by the appellant to exculpate himself from the charges in respect of all those occasions that he was found to have failed to report or record as required. In fact, evidence was led from his supervisors but there was little if any specificity in the evidence to justify the appellant's failure to report for duty or record his time of arrival and departure from work on those specific days that he was found to have failed to do so. That he had to work out of office on occasions was confirmed by his supervisors but there was no justification given for why he had failed to report for work on those occasions that were proven or why he had failed to record his time of arrival and departure from office (see para 55).

(5) Based on the above findings, the court held that there was no illegality, procedural impropriety or irrationality demonstrated in respect of the disciplinary proceedings in question, its process or the decision arrived at (see para 58).

(6) Order 53 r 3(2) of the Rules of Court 2012 ('the ROC'), in respect of the statement to be provided when obtaining leave, was couched in mandatory terms. The issue of proportionality of punishment was not an issue that was raised in the appellant's statement given pursuant to O 53 r 3(2) of the ROC. It would appear to have been an afterthought, having regard to the fact that it was only raised in the appellant's supplementary memorandum of appeal. Further, the court should be very slow to deem any punishment meted out in disciplinary cases as being disproportionate. In the present case, the court did not find that appellant's dismissal was unreasonable or obviously disproportionate such as to warrant any interference by the court. To some, the number of days the appellant failed to report or record as required may be relatively small. However, the court was of the view that it was enough to betray an irresponsible attitude of indifference to the need for discipline in a person of the appellant's rank (see paras 59–60 & 74–76).

[Bahasa Malaysia summary

Perayu merupakan penjawat awam yang memegang jawatan Timbalan Pengarah Kastam gred WK44 (pemangkuan) di Jabatan Kastam Diraja Malaysia. Perayu telah diberhentikan perkhidmatan oleh Suruhanjaya Perkhidmatan Awam kerana didapati bersalah atas tiga pertuduhan iaitu tidak hadir bertugas tanpa kebenaran, gagal mendaftar keluar masuk pejabat, dan datang lewat ke pejabat dan keluar awal dari pejabat tanpa kebenaran. Permohonan perayu untuk semakan kehakiman telah ditolak oleh Mahkamah Tinggi, oleh itu, rayuan semasa. Perayu berhujah bahawa: (a) pertuduhan adalah cacat kerana bilangan hari yang dinyatakan dalam pertuduhan tidak semuanya dibuktikan; (b) tiada siasatan dalaman seperti yang dikehendaki di bawah peraturan-peraturan 6.1.2 dan 6.1.4 perintah am 'Perintah Am Bil 177 — Pelaksanaan Dan Pemantauan Kehadiran Waktu Bekerja' bertarikh 13 Mac 2017 ('perintah am tersebut'), oleh itu, terdapat ketidakwajaran prosedur; (c) pandangan penyelia-penyelia perayu dalam menyokong fakta bahawa tugas perayu yang memerlukan perayu berada di luar pejabat tidak dipertimbangkan atau diberi pertimbangan yang secukupnya; (d) adalah jelas daripada keterangan bahawa perayu telah meninggalkan pejabatnya untuk menjalankan tugasnya atas arahan yang diberikan, oleh itu, menurut peraturan 37(5) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993'), satu jawatankuasa penyiasatan perlu ditubuhkan untuk menyiasat isu tersebut; dan (e) hukuman yang dikenakan adalah tidak setimpal.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada asas logik atau rasional mengapa pertuduhan-pertuduhan tersebut boleh dikatakan cacat hanya kerana jumlah hari perayu didapati tidak hadir bertugas atau gagal merekodkan kehadirannya tidak sepadan dengan bilangan hari yang dinyatakan dalam pertuduhan-pertuduhan tersebut. Pengerusi Suruhanjaya Perkhidmatan Awam dalam afidavitnya secara terang-terangan mendedahkan bahawa jumlah hari adalah lebih sedikit daripada yang dikemukakan dalam pertuduhan-pertuduhan tersebut. Ini menunjukkan bahawa terdapat pertimbangan yang cukup teliti terhadap pertuduhan-pertuduhan yang dikemukakan yang tanpanya dapatan-dapatan ini tidak mungkin boleh dibuat (lihat perenggan 41–42).

(2) Peraturan 6 perintah am bertajuk 'Pemantauan'. Perintah am tersebut adalah jelas untuk tujuan pemantauan. Walau bagaimanapun, tidak dinyatakan di mana-mana bahawa terdapat keperluan untuk siasatan dalaman dilakukan sebelum tindakan tatatertib boleh diambil. Ia juga tidak boleh dikatakan bahawa sekiranya terdapat kegagalan pegawai penyelia untuk menggunapakai peraturan 6.1.4, tindakan tatatertib tidak boleh diambil. Peruntukan tatatertib di bawah Peraturan 1993 dan perintah am tersebut adalah dua set peraturan yang berbeza. Pemakaian kedua-duanya tidak bergantung antara satu sama lain (lihat perenggan 46 & 48).

(3) Tidak ada keperluan untuk satu jawatankuasa penyiasatan ditubuhkan di bawah peraturan 37(5) Peraturan 1993. Adalah jelas bahawa peraturan 37(5) direka untuk membantu tribunal tatatertib jika mereka berpendapat bahawa kes terhadap pegawai berkenaan memerlukan penjelasan lanjut. Dalam kes ini, keterangan mengenai kegagalan perayu untuk merekodkan kehadirannya dan masa ketibaan dan keluar dari kerja disokong oleh buku rekod perkhidmatan perayu dan catatan di dalamnya dan laporan kehadiran berdasarkan buku rekod. Pembelaan yang diberikan oleh perayu sama ada tidak disokong atau tidak mewajarkan ketidakhadirannya daripada bertugas atau kegagalannya untuk merekodkan masa ketibaan dan keluar dari pejabat (lihat perenggan 49 & 53).

(4) Tiada keterangan mengenai apa-apa arahan khusus dikemukakan oleh perayu untuk mengecualikan dirinya daripada pertuduhan-pertuduhan berkenaan dengan semua keadaan yang dia didapati gagal melaporkan atau merekodkan seperti yang diperlukan. Malah, keterangan telah dikemukakan daripada penyelia-penyelianya tetapi jika ada pun hanya terdapat sedikit sahaja kekhususan dalam keterangan tersebut untuk mewajarkan kegagalan perayu melaporkan untuk bertugas atau merekodkan masa ketibaan dan keluar dari kerja pada hari-hari tertentu yang didapati gagal berbuat demikian. Bahawa dia terpaksa bekerja di

luar pejabat pada masa-masa tertentu telah disahkan oleh penyelia-penyelianya tetapi tidak ada justifikasi yang diberikan mengapa dia gagal melaporkan diri untuk bekerja pada masa-masa yang dibuktikan atau mengapa dia gagal merekodkan masa ketibaan dan keluar dari pejabat (lihat perenggan 55).

(5) Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa tidak terdapat kesalahan undang-undang, ketidakwajaran prosedur atau tidak rasional yang ditunjukkan berkenaan dengan prosiding tatatertib yang dipersoalkan, prosesnya atau keputusan yang dicapai (lihat perenggan 58).

(6) Aturan 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'), berkenaan dengan pernyataan yang perlu diberikan semasa mendapatkan kebenaran, telah dinyatakan dalam terma mandatori. Isu perkadaran hukuman bukanlah isu yang dibangkitkan dalam pernyataan perayu yang diberikan menurut A 53 k 3(2) KKM 2012. Ia kelihatan seperti pemikiran terkemudian, dengan mengambil kira fakta bahawa ia hanya dibangkitkan dalam memorandum rayuan tambahan perayu. Tambahan pula, mahkamah sepatutnya tidak terburu-bure dalam menganggap apa-apa hukuman yang dikenakan dalam kes tatatertib sebagai tidak setimpal. Dalam kes ini, mahkamah tidak mendapati bahawa pemecatan perayu adalah tidak munasabah atau jelas tidak setimpal yang memerlukan apa-apa campur tangan oleh mahkamah. Bagi sesetengah orang, bilangan hari perayu gagal melaporkan atau merekodkan seperti yang diperlukan mungkin agak kecil. Walau bagaimanapun, mahkamah berpandangan bahawa ia sudah cukup untuk mengkhianati sikap tidak bertanggungjawab iaitu sikap tidak peduli terhadap keperluan disiplin dalam diri seseorang yang berpangkat seperti perayu (lihat perenggan 59–60 & 74–76).]

Cases referred to

Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 4 MLJ 1; [2010] 3 CLJ 643, FC (refd)

Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 2 MLJ 131, CA (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor [2020] 5 MLJ 185, FC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)

Iszam Kamal bin Ismail v Prestij Bestari Sdn Bhd (Bar Council Malaysia, intervener) [2018] 5 MLJ 536, CA (refd)

Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)

A *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor [2021] 6 MLJ 750, CA (refd)
B *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153, FC (refd)
Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ
C 1; [2008] 6 CLJ 573, FC (refd)
R Rama Chandran v The Industrial Court Of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
D *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors [2000] 3 MLJ 652, CA (refd)

E **Legislation referred to**

Courts of Judicature Act 1964 Schedule
Federal Constitution art 132
Industrial Relations Act 1967 s 20(3)
Public Officers (Conduct and Discipline) (Cap D) General Orders 1980
F O 26(4)
Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(g), (2)(i), 24, 37(1), (2)(b), (5)
Rules of Court 2012 O 53 r 3(1), 3(2)
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 53

G

Appeal from: Judicial Review Application No BA-25–23–05 of 2018 (High Court, Shah Alam)

Thayalan Moorthy (Dharan & Thaya) for the appellant.
H *Kogilambigai Muthusamy (Attorney General's Chambers) for the respondents.*

Darryl Goon JCA:

[1] This case concerned a challenge by the appellant to the decision of the
I Public Services Commission in ordering his dismissal as a Deputy Director of Customs after having found him guilty of three disciplinary charges preferred against him.

THE BACKGROUND FACTS

[2] The appellant was at all material times a civil servant holding the position of a Deputy Director of Customs, Grade WK44 (acting) in the Royal Malaysian Customs Department. At the time of his actual dismissal, the appellant was serving in the Technical Services Division of the Royal Malaysian Customs Department in Putrajaya.

[3] A complaint with several allegations were lodged against the appellant with the Chairman of the Lembaga Tatatertib Bagi Kumpulan Pengurusan (No 2) Jabatan Kastam Diraja, Malaysia. The appellant was then serving in the Cawangan Pematuhan, Stesen Bentong, of the Royal Malaysian Customs Department in the state of Pahang.

[4] On 29 Jun 2015, the Chairman of the Lembaga Tatatertib Bagi Kumpulan Pengurusan (No 2) Jabatan Kastam Diraja Malaysia, after having considered the complaint, had determined that the subject matter of the complaint was of such a nature that warrants a dismissal or reduction in rank in accordance with reg 37(1) of the Public Officers (Conduct and Discipline) Regulations 1993, made pursuant to art 132 of the Federal Constitution.

[5] The matter was then referred to the Public Services Commission of Malaysia. The Chairman of the Public Services Commission decided that there was a prima facie case made out against the appellant in accordance with reg 37(2) and his decision was set out in writing dated 28 April 2017.

[6] The appellant was then issued with what may be described as a show cause letter dated 4 May 2017, with the three charges set out therein against the appellant:

(a) for being absent from duty without leave or without prior permission or without reasonable cause for a total of 84 days (63 days in 2014 and 21 days in 2015) contrary to reg 24 of the Public Officers (Conduct and Discipline) Regulations 1993 ('first charge');

('Bahawa tuan, Sam Maark a/l Verak (KP:771021–09–7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan tidak hadir bertugas tanpa cuti atau tanpa terlebih dahulu mendapat kebenaran atau tanpa sebab munasabah selama 84 hari pada tarikh-tarikh seperti berikut: ...')

(b) for failing to register his movements in or out of the office or punching his Punch Card on 29 occasions ie eight in, 21 out, contrary to Surat Pekeliling Am Bil 11 Tahun 1981 and Pekeliling Perkhidmatan Bil 2

Tahun 2007 ('second charge');

('Bahawa tuan, Sam Maark a/l Verak (KP: 771021–09–7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan tidak mendaftar kedatangan atau kepulangan atau mengetik Kad Perakam Waktu sebanyak 29 kali iaitu 8 kali ketika masuk dan 21 kali ketika keluar seperti berikut: ...'); and

(c) for coming in late for duty to the office without leave or without reasonable cause for 25 times and leaving early once, contrary to Perintah Am 5, Perintah-Perintah Am Bab G ('third charge').

('Bahawa tuan, Sam Maark a/l Verak (KP: 771021–09–7279), Penguasa Kastam Gred WK44 (Memangku) semasa bertugas di Cawangan Pematuhan, Stesen Bentong, Jabatan Kastam Diraja Malaysia, Pahang telah melakukan kesalahan lewat hadir bertugas ke pejabat tanpa kebenaran atau sebab yang munasabah sebanyak 25 kali dan balik awal sebanyak satu (1) kali pada tarikh-tarikh seperti berikut: ...')

Particulars of the relevant months, dates and time relating to the charges were provided in a table below the charges including the relevant provisions in the Public Officers (Conduct and Discipline) Regulations 1993, relied upon.

[7] The appellant was provided an opportunity to be heard according to the procedure provided under para (2)(b) of reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993. Accordingly, the appellant provided his written representation, dated 28 June 2017, to the charges preferred against him.

[8] On 12 February 2018, having considered the appellant's representation, the Public Services Commission found that the appellant had failed to exculpate himself of all the charges preferred against him, although the number of days he was found to have been guilty, based on the charges, were less than those set out in the charges. The appellant was found guilty of all three charges and the decision made was that the appellant be dismissed with effect from 12 February 2018.

[9] Following this, the appellant sought and obtained leave to apply for a judicial review of the decision dismissing him. The reliefs sought by the appellant were the following:

2. Relif-relif yang dituntut oleh Pemohon adalah seperti berikut:

2.1 Bahawa kebenaran dan kebebasan diberiikan kepada Pemohon untuk memohon Semakan Kehakiman di bawah Aturan 53 Kaedah 3(1) Kaedah-Kaedah Mahkamah 2012;

2.2 Bahawa satu Perintah Certiorari diberi untuk membatalkan dan mengenepikan sama sekali keputusan Pihak berkuasa Tatatertib Suruhanjaya Perkhidmatan Awam Malaysia (Responden Pertama) dan Suruhanjaya Perkhidmatan Awam Malaysia (Responden Kedua) yang telah diberikan melalui surat bertarikh 20 Februari 2018 dan diterima oleh Pemohon pada 6 Mac 2018;

2.3 Bahawa suatu perintah Deklarasi bahawa hukuman buang kerja ke atas Pemohon adalah batal dan tidak sah ('null and void') dan tidak berkuatkuasa dan diketepikan dan Pemohon dikekalkan 'status quo' Pemohon kepada jawatan asal sebagai Penguasa Kastam Gred WK44 (memangku) dan dibayar gaji, kesemua faedah, dan bonus yang sewajarnya mengikut pangkat serta kelayakannya;

2.4 Bahawa satu Perintah Mandamus diberi untuk mengarahkan Responden-responden;

2.4.1 Mengembalikan semula jawatan Pemohon selaku Penolong Pengarah Kastam di Ibu Pejabat, Jabatan Kastam Diraja Malaysia, Bahagian Perkhidmatan Teknik, Cawangan Perakaunan Hasil dan membayar gaji yang berselari dengan pangkat serta kelayakan Pemohon;

2.4.2 Membentuk sebuah jawatankuasa bagi menentukan jumlah tunggakan gaji, elaun, dan faedah yang berhak dinikmati oleh Pemohon bermula dari tarikh pembuangan kerja Pemohon hinggalah ke tarikh penyelesaian penuh;

2.4.3 Membayar ganti rugi kerana tindakan Responden-responden telah mencemarkan nama baik serta memalukan Pemohon;

2.4.4 Membayar ganti rugi am dan/atau ganti rugi teruk dan/atau ganti rugi teladan dan/atau ganti rugi punitif atas penyiasatan yang tidak komprehensif, juga atas sikap ketidaktelitian dalam membuat pertimbangan yang mana akhimya telah menyebabkan Pemohon mengalami kejutan mental dan gangguan emosi yang teruk;

2.4.5 Membayar faedah atas kadar 5% setahun dari tarikh pembuangan kerja (12hb Februari 2018) hingga ke tarikh perintah;

2.4.6 Membayar faedah atas kadar 5% setahun dari tarikh perintah hingga ketarikh penyelesaian penuh;

3. Kos tindakan ini ditanggung oleh Responden-Responden; dan

4. Sebarang relif lain yang dianggap adil dan suaimanfaat oleh Mahkamah yang Mulia ini.'

[10] The grounds for seeking the forgoing reliefs were set out in the appellant's statement delivered pursuant to O 53 r 3(2) of the Rules of Court 2012 and they were as follows:

5. Alasan-alasan yang menyokong permohonan ini adalah:-

5.1 Keputusan buang kerja yang dikenakan terhadap Pemohon adalah bercanggah dengan peruntukan peruntukan perundangan semasa *(Illegality)* dan *ultra vires:*

5.2 Faktor maklumat tidak lengkap serta tidak komprehensif:

5.3 Faktor sistem pengurusan kehadiran yang tidak mengikut spesifikasi;

A 5.4 Faktor kehilangan bukti-bukti yang relevan menyukarkan Pemohon memberikan justifikasi terhadap pertuduhan;

5.5 Tugas Pemohon selaku pegawai Audit adalah perlu sentiasa bekerja di luar pejabat *(Nature of business);*

B 5.6 Pemohon mempunyai rekod prestasi yang baik sebelum dan selepas ditukarkan ke Jabatan Kastam Diraja Malaysia, Pahang pada 06/01/2014:

5.7 Pemohon tidak diberi peluang menjalani proses tindakan tatatertib yang adil dan tulus; *(Procedural Impropriety)*

C 5.8 Tiada sebarang amaran bertulis atau secara lisan oleh Ketua Jabatan/Pejabat/Penyelia berkenaan kemerosotan prestasi kelja Pemohon:

5.9 Terdapat unsur 'selective' atau 'mala fide' dalam tindakan jawatankuasa tatatertib kerana terdapat juga pegawai yang tidak mengemaskini rekod kehadiran, tidak mengketik, datang lewat, pulang awal dan tidak hadir kerja, namun tiada sebarang tindakan dan/atau siasatan dan/atau hukuman dikenakan terhadap D mereka: dan

5.10 Terdapat kelewatan dan/atau penangguhan masa vang tidak munasabah *'time laches'* dalam tindakan yang telah diambil terhadap Pemohon: dan

Lain-lain alasan yang terdapat dalam Afidavit Sam Maark A/L Verak (No. K/P: E 771021-08-7279) yang diikrarkan pada 08 haribulan Mei 2018, dan difailkan disiniakan dibaca untuk menyokong permohonan ini.

[11] It was the appellant's contention in his affidavit, filed in support of his application for judicial review, that the complaints should have been referred to F his supervisors and he should have been given a chance to explain prior to the charges being preferred. It was also contended that a prior comprehensive disciplinary investigation ought to have been carried out. The appellant complained that he was never given any prior warning regarding his failure to record time. The appellant then referred to the fact that there were regulations G and procedures for recording time, including procedures for monitoring time recording by officers, which procedures should have been first invoked. He also complained that he was not given an oral hearing.

H **[12]** The appellant also claimed that his car was stolen on 19 April 2017 along with his official diary, 'thumb-drive' and some documents that were in the car. A police report was lodged by the appellant on 20 April 2017. In his police report, the appellant stated specifically, 'DI DALAM KENDERAAN SAYA TERDAPAT DAIRI HARIAN RASMI, DOCUMENT TUGASAN I DAN SIJIL-SIJIL SEJAK TAHUN 2014'.

[13] The appellant also maintained that the electronic recording system that was provided was problematic and many do not use it. It was also alleged that there was an element of mala fides in that disciplinary proceedings have not

been taken against others who have not recorded time as required. As a result, he encountered difficulties in justifying events that occurred some three years prior.

[14] The appellant explained that as an audit officer at the material time, his work involved being out of the office. He would often be instructed by his superiors to launch and carry out audits in various places. The places can be very distant and it would have been impossible for him to return to the office to record the time of his arrival at, and leaving from, the office.

[15] The appellant deposed that he had never been accused of absenteeism or of under-performing. He had been the recipient of a Certificate of Appreciation and an Outstanding Service Award in 2014 and was promoted from Grade W41 to Grade W44 effective on 1 December 2014. He also maintained that a lesser punishment should have been considered.

[16] In his affidavit, the Chairman of the Public Services Commission stated that in regard to the first charge against the appellant, he was found to have been absent from work for 25 days over the period from February 2014 to July 2015. This was fewer than the eighty-four days set out in the first charge. It was also found that the appellant had failed to report at the Bentong Station, although he was given written instructions dated 14 October 2014 to do so. The appellant's explanation for not recording his attendance due to his fieldwork was found not a justifiable excuse. In respect of the first charge, the appellant was found to have breached reg 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.

[17] In relation to the second charge, it was found that the appellant had failed to clock in on four occasions and had failed to clock out on fourteen occasions. This was fewer than the twenty-nine times set out in the second charge. His explanation that the electronic recording device 'fingertac' failed was found not acceptable as there was an alternative provided for such occasions. There was in place a system of manual recording in a book that could have been used by the appellant. The appellant's explanation that he was attending to official duties outside the station was found not justifiable as he could have recorded his attendance after performing his official duties or before leaving the office to perform his duties. In addition, there were no written instructions disclosed by the appellant to support his explanation that he was out of office on official business on those occasions. The appellant was found to have breached reg 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.

[18] As for the third charge, the appellant was found to have been late in reporting for duty without leave or any justifiable cause on twenty-three

occasions. This was also fewer than the 26 times set out in the third charge. That he had to return to his residence in Puchong, Selangor, to take care of his family, despite his having a rented room in Bentong, was found not to be an acceptable excuse. The appellant's claim to have been on official visits was not supported by any written instructions given and this explanation given was also found wanting. The reason given that he had gone to collect his National Registration Identity Card and the 'Whatsapp' messages relied upon by the appellant did not disclose that he was granted any permission to be late for work by his Head of Department. The appellant was found to have breached reg 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993.

[19] Regulation 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) Regulations 1993 state as follows:

> 4 General
>
> (1) ...
>
> (2) An officer shall not —
>
> (a) ...
>
> ...
>
> (g) be irresponsible;
>
> ...
>
> (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; ...

[20] The comments of the appellant's supervisors in support of the appellant were held to be general in nature and did not exculpate the appellant for those occasions that the appellant was found to be in breach as per the charges. That the appellant's diary and documents were stolen along with his car, was found not to be a valid excuse as the required information could have been obtained from the Department itself.

[21] The Chairman of the Public Services Commission of Malaysia in his affidavit also stated that an officer may be promoted as long as the officer was not subject to disciplinary proceedings, referring to Pekeliling Perkhidmatan Bilangan 3 Tahun 2009, Dasar Kenaikan Pangkat Bagi Pegawai Hukuman Tatatertib.

[22] By reason of its findings, the appellant was dismissed by the Public Services Commission of Malaysia.

[23] Before this court, and in the written submissions of learned counsel for the appellant, four specific issues were proffered as to why the appellant's appeal should be allowed.

THE APPELLANT'S CONTENTIONS

[24] The appellant's contentions before this court were quite specific. In his written submissions, learned counsel had headed his first ground 'PERTUDUHAN YANG CACAT'. Under this heading, the contention was predicated on paras 27–29 of the learned High Court judge's grounds of judgment.

[25] In paras 27, 28 and 29 of the grounds of judgment, the learned High Court judge stated as follows:

> 27. Responden kedua di dalam affidavit beliau (Lampiran 32) di perenggan 4.7 telah menerangkan bahawa setelah dikaji telah dikenalpasti jumlah ketidakhadiran dan kegagalan memetik kad perakam waktu tanpa kebenaran atau tanpa sebab yang munasabah. Perbandingan telah dibuat dengan memo-memo yang mengarahkan pemohon hadir untuk mesyuarat, kursus, kerja audit, ceramah, perbincangan seperti yang dikemukakan oleh pemohon dieksibit SMV-2, SMV-5, SMV-11, SMV-12 (rekod kehadiran) yang berkaitan dengan pertuduhan-pertuduhan terhadapnya. Jelas perbuatan-perbuatan seperti dalam pertuduhan-pertuduhan berlaku walaupun jumlah hari dan kegagalan memetik kad perakam dikurangkan setelah perbandingan dan penjelasan diambil kira.
>
> 28. Sistem rakaman kehadiran disediakan secara elektronik dan manual jika berlaku kerosakan. Buku kehadiran secara manual menunjukkan sebarang catitan oleh pemohon. Tarikh-tarikh 14.12.2014, 16.12.2014 dan 24.12.2014 tiada sebarang memo atau surat mengarahkan pemohon bertugas di luar pejabat.
>
> 29. Tidak dinafikan jumlah hari ketidakhadiran dan kegagalan mengetik kad perakam waktu, setelah diteliti akan representasi pemohon, tidak seperti jumlah yang dinyatakan di dalam pertuduhan-pertuduhan. Namun ianya tidak bermakna keputusan responden kedua terjumlah kepada ketaksahan, tidak munasabah atau ketidakpatuhan. Pemohon berjaya menyangkal sebahagian tarikh-tarikh yang dinyatakan tetapi tidak kesemua tarikh-tarikh di dalam ketiga-tiga pertuduhan-pertuduhan. lni menunjukkan penelitian dilakukan oleh responden kedua di dalam membuat pertimbangan bagi keputusan yang dicapai.

[26] Based upon what was set out in those paragraphs, it was maintained that the learned High Court judge was aware that the charges levelled against the appellant were defective. The number of days stated in the charges were not all proven. Accordingly, it was submitted, the charges were successfully refuted by the appellant.

[27] The appellant's second contention was that there was no prior internal investigation before the appellant was charged and disciplinary action taken.

An internal investigation would allow the appellant an opportunity to provide his explanation before any disciplinary action is taken. As for this contention reliance was placed on reg 6.1.2 and 6.1.4 of the general orders 'Perintah Am Bil 177 — Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja' dated 13 March 2017 which provides as follows:

> 6. PEMANTAUAN
>
> 6.1 Sistem Perakam Waktu Elektronik (PWE)
>
> 6.1.1 Pegawai Pentadbir Sistem PWE (PPS) mengeluarkan laporan bulanan setiap pegawai untuk semakan.
>
> 6.1.2 Pegawai hendaklah mengemukakan penjelasan sebab ketidakhadiran/datang lewat/pulang awal.
>
> 6.1.3 Pegawai Penyelia hendaklan memberikan pengesahan terhadap alasan yang dirasakan munasabah dan kemukakan kepada pihak KPSM.
>
> 6.1.4 Pegawai Penyelia hendaklah mengeluarkan surat meminta penjelasan kepada pegawai dan datang lewat atau pulang awal sebanyak tiga (3) kali dalam tempoh sebulan. Pegawai tersebut hendaklah mengemukakan surat penjelasan secara bertulis kepada Pegawai Penyelia dalam tempoh 14 hari dari tarikh surat tersebut. Sekiranya Pegawai Penyelia tidak berpuashati dengan surat penjelasan tersebut, Amaran Bertulis Pertama perlu dikeluarkan.'

[28] It was contended that by reason of reg 6.1.2 and 6.1.4, there has to be an internal inquiry failing which, as in this case, there would exist, procedural impropriety.

[29] The appellant's third contention turned on issues of fact. It was contended that the learned High Court judge had erred in disregarding the fact that the appellant as an audit officer was, upon instructions, required to work out of office. It was contended that the appellant's supervisors' views in supporting the fact that the appellant's duties involved being out of the office were not considered or given adequate consideration. Two of the appellant's supervisors had supported the appellant in the disciplinary proceedings and had maintained that the appellant was an exemplary officer and had confirmed that his duties often required him to be out of the office. The appellant also pointed to the fact that there were in evidence memoranda instructing the appellant to attend for assignments, courses and other matters. Notwithstanding the evidence, the appellant was found guilty of the charges and dismissed. This, it was maintained was irrational.

[30] The appellant's fourth contention was pivoted on reg 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993. Regulation 37(5) provides as follows:

(5) If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification.

[31] The appellant's contention was that it was clear from the evidence that the appellant had left his office to carry out his duties on instructions given. In the circumstances, it was necessary that an Investigation Committee be established to investigate the issue.

[32] Lastly, although not given a specific heading in the written submissions for the appellant, the proportionality of the punishment meted out to the appellant was addressed. The contention that the punishment meted out was disproportionate and too severe was included as additional grounds of appeal in the appellant's supplementary memorandum of appeal.

[33] Learned federal counsel on behalf of the respondents refuted the appellant's contention. It was contended that the learned High Court judge was correct when His Lordship held that the charges were not defective in themselves merely because the tribunal had found that the appellant was at fault fewer than the number of days set out in the charges. It was also contended that there was no requirement that a prior internal inquiry be conducted before disciplinary proceedings may be commenced. In addition, it was contended that the learned High Court judge did not err in holding that it was up to the disciplinary authority to consider whether an Investigation Committee should be established. Besides, it was contended, the appellant never requested for an oral hearing. As for the proportionality of the punishment meted out to the appellant, it was contended that it was entirely within the remit of the disciplinary tribunal to determine the seriousness of the misconduct and to decide on the punishment.

THE APPELLANT'S APPEAL

[34] The principles relating to judicial review of administrative and quasi-judicial decisions have undergone much change. This is undeniably and obviously so after the decision of the Federal Court in *R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145. In 2000, following the decision in *R Rama Chandran*, O 53 of the Rules of the High Court 1980 that caters for applications for judicial review was amended. There were further amendments to O 53, resulting in the iteration of that order as it now appears in the Rules of Court 2012.

[35] While the principles relating to judicial review have evolved, there is still a difference in the extent of the court's powers in a judicial review, when compared to an *appeal* properly so called. The latitude for appellate

intervention in a decision of a court of first instance is wider than when the court exercises its judicial review powers over non-judicial tribunals. The latter is the exercise of a supervisory jurisdiction developed by the common law while the former is an appellate jurisdiction derived from statute.

[36] It is, in this respect, worthwhile to refer to what Edgar Joseph Jr FCJ said in *R Rama Chanran*, at p 191:

> The starting point is to define 'Judicial Review'. According to 37 *Halsbury's Laws* (4th Ed) para 567, the process of Judicial Review is that:
>
> > ... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.
>
> Next, it is necessary to compare *appellate* review jurisdiction with *supervisory* review jurisdiction.
>
> It is clear law that *appellate* review jurisdiction is solely a creature of statute while *supervisory* review jurisdiction is the creature of the common law and is available in the exercise of the courts' *inherent* power but, I would hasten to add, its extent may be determined not merely by judicial development but *also by legislative intervention*. As Abbott CJ put it succinctly in *R v Cashiobury Hundred Justices* (1823) 3 Dow & Ry 35; 26 RR 604:
>
> > [Supervisory review] always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by ... statute ...
>
> It is true that both *appellate* review and *supervisory* review are concerned with the correction of error but, it has often been said, that they are radically different processes.
>
> Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus, *appellate* jurisdiction is concerned with the merits of a case.

[37] In *R Rama Chandran,* Edgar Joseph Jr FCJ expressed, by reference to the Schedule in the Courts of Judicature Act 1964, that:

> ... it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions.

[38] This wider power that exists was spoken of by Edgar Joseph Jr FCJ in the context of the power to mould the remedy that a court may afford an applicant to suit the justice of the case. As His Lordship stated:

> The need for such a wider power is illustrated by the case of *Chief Constable of North*

> *Wales Police v Evans* where the House of Lords was struggling to mould the remedy to suit the justice of the case ...
>
> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.
>
> ...
>
> On the other hand, having regard to the rapidly developing law in applications for Judicial Review, whenever legally permissible, we must demonstrate a willingness to mould the remedies available to suit the justice of the case.

[39] The limits within which courts may exercise its supervisory power of review are, at this point in time, quite settled. It is where the decision challenged may be said to be marred by illegality, irrationality or procedural impropriety. The meaning for each of these heads of challenge have also been the subject of judicial explanation and their respective ambits are sufficiently clear. They stem from the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and in particular, the speech of Lord Diplock. However, Lord Diplock was hesitant in adopting the principle of proportionality stating that, 'I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; ...'. In fact, shortly after *R Rama Chandran*, Edgar Joseph Jr FCJ in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1, after referring to the decisions in several English cases, applied the principle of proportionality in that case stating that, '... the severity of the requirements of the disputed condition would be out of all proportion to the extension of planning permission sought'. Since then the principle of proportionality in judicial review has gained much momentum (see *Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor* [2020] 5 MLJ 185; *Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor* [2021] 6 MLJ 750 (CA); *Iszam Kamal bin Ismail v Prestij Bestari Sdn Bhd (Bar Council Malaysia, intervener)* [2018] 5 MLJ 536). Proportionality also has a constitutional dimension but which is not relevant for the purposes of this case (see the discussion in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; and *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213).

[40] The foregoing basic principles have been reiterated to underscore the fact that there still remains a fundamental juristic difference between an appeal

and a judicial review. The court should therefore be mindful not to transgress the line between the two that is delineated by the tests and principles of illegality, irrationality, procedural impropriety and proportionality.

[41] In relation to the finding of guilt against the appellant, there is no logical or rational basis why the charges may be said to be defective merely because the total number of days the appellant was found to have been absent from duty or had failed to record his attendance did not match the exact number of days set out in the charges.

[42] The Chairman of the Public Services Commission in his affidavit had candidly disclosed that the total number of days that the appellant was found to have been absent from duty and the number of days that the appellant had failed to record his attendance, including when he left his office, were fewer than those presented in the charges. One cannot help concluding that this indicates that there was sufficiently careful consideration of the charges presented without which these findings could not have been made. In this regard we agree with what the learned High Court judge had stated in para 29 of His Lordship's grounds of judgment:

> Namun ianya tidak bermakna keputusan responden kedua terjumlah kepada ketaksahan, tidak munasabah atau ketidakpatuhan. Pemohon berjaya menyangkal sebahagian tarikh-tarikh yang dinyatakan tetapi tidak kesemua tarikh-tarikh di dalam ketiga-tiga pertuduhan-pertuduhan. Ini menunjukkan penelitian dilakukan oleh responden kedua di dalam membuat pertimbangan bagi keputusan yang dicapai.

In para 30 of His Lordships grounds of judgment, the learned High Court judge then concluded, and in our view rightly:

> [30] Malah andainya cuma satu sahaja pertuduhan dapat dibuktikan dan tiada kecacatan berlaku keputusan responden kedua tidak boleh diketepikan apatah lagi dalam kes ini ketiga-tiga pertuduhan dibuktikan. Oleh itu Mahkamah ini tidak mendapati berlakunya kecacatan dari segi ketaksahan atau tidak munasabah di pihak responden kedua walaupun adanya tarikh-tarikh di dalam ketiga-tiga pertuduhan dapat disangkalkan oleh pemohon.

[43] As for the requirement of a prior internal inquiry, the starting point must be the validity of the procedure that has been laid down and applied. In *Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1 at p 16; [2010] 3 CLJ 643, at p 659, Zulkefli Makinudin FCJ (as His Lordship then was) delivering the judgment of the court stated:

> [24] On the requirement for the provisions in any disciplinary procedure or regulations such as the 1993 Regulations to comply with the principles relating to procedural and substantive fairness guaranteed under arts 5(1) and 8(1) of the Federal Constitution as contended by learned counsel for the appellant, *we only need to state here that the Federal Court in Lembaga Tatatertib Perkhidmatan Hospital Besar*

Pulau Pinang & Anor v Utra Badi K Perumal had already decided that the General Orders which in our view would include the 1993 Regulations are in accord with the principles of natural justice and procedural fairness wherein at p 551 it had this to say:

> Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedure therein, have sufficiently complied with article 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. (Emphasis added.)

[44] In maintaining that there should first be an internal inquiry, and as mentioned, reliance was placed on regs 6.1.2 and 6.1.4 of the general orders 'Perintah Am Bil 177 — Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja' dated 13 March 2017.

[45] These regulations, evident from the title given, are for the implementation and monitoring of attendances at work. Two systems for recording the time an officer reports for work and leaves work were implemented namely 'Sistem Perakam Waktu Elektronik' and 'Sistem Kad Perakam Waktu'.

[46] Regulation 6 of these regulations is headed 'Pemantauan'. The regulations are clearly for the purpose of monitoring. Thus reg 6.1.1 requires the officer who is the administrator to issue a monthly report on each officer for review. Regulation 6.1.2 requires the officer to provide reasons for his absence. Regulation 6.1.3 requires the supervisor to provide confirmation of the reasons given that are regarded as reasonable. Regulation 6.1.4 requires the supervising officer to obtain an explanation from an officer who is late to work or leaves early for more than three times a month.

[47] That there exist systems and regulations for monitoring attendance at work, the time an officer arrives for work and leaves and the requirement of monthly reports leave no doubt that attendance at work is clearly a matter of significant importance. That such regulations are required also suggests that there is a need for them.

[48] However, nowhere is it suggested that there is a need for an internal inquiry before disciplinary action may be taken. It also cannot be the case that should there be a failure of a supervising officer to invoke reg 6.1.4, disciplinary action may therefore never be taken. In our view, the disciplinary provisions under the Public Officers (Conduct and Discipline) Regulations 1993 and the 'Perintah Am Bil 177 — Pelaksanaan Dan Pemantauan Kehadiran Waktu Berkerja' dated 13 March 2017 are two discrete sets of regulations. Neither is conditional upon the other being first invoked.

[49] Was there also a need for a Committee of Investigation to be constituted under reg 37(5) of the Public Officers (Conduct and Discipline) Regulations 1993 as contended by the appellant? We do not think so. It is quite clear that reg 37(5) was designed to assist the disciplinary tribunal if it is of opinion that the case against the officer concerned requires further clarification. In such an event, the disciplinary tribunal may then establish an Investigation Committee for the purpose of obtaining further clarification.

[50] Reliance was placed on the decision of this court in *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131. In that case, four charges were preferred against the appellant. The facts disclosed that in the appellant's written representation in respect of two of the charges, the appellant had denied receiving any bribe. In addition, his denial was corroborated by a statutory declaration sworn by one Sanmugam who denied receiving or giving any money to the appellant. The third and fourth charges were said to be inter-related with the first two charges. In addition, in respect of the third charge, which concerned the appellant's failure to report of illegal gambling activities in Seremban, the appellant's defence was that he had no such information. This was because the appellant was attached to IPD cawangan mahkamah as a prosecuting officer. Most significantly, in that case, was the fact that there was no evidence provided to the contrary by the respondent. The evidence of Sanmugam was also not challenged.

[51] It was in those specific circumstances in the case of *Ang Seng Wan* that it was held that an oral hearing should have been held based on the then General O 26(4) of Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. As Mohd Saari JCA, delivering the judgment of the court at p 136, stated:

> Under O 26(4) of the General Orders 1980, it states:
>
> > [I]f the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.
>
> In applying O 26(4) aforesaid to the facts and circumstances of this case, we are of the view that, by his letter dated 23 July 1993, ASP Ang had given sufficient exculpatory statement to rebut all the four charges. On the other hand, with regard to the defence's case, we find no evidence whatsoever to substantiate the four charges.

[52] Mohd Saari JCA then stated succinctly in *Ang Seng Wan*, at p 136:

> However, what troubles this court is that, from the record, there is no evidence whatsoever to rebut or contradict the exculpatory statement of Ang.

[53] The circumstances found to be vital in *Ang Seng Wan* were not present in the case at hand. Here, evidence of the appellant's failure to record his attendance and time of arrival and departure from work were supported by the appellant's service record book and the entries therein and the attendance report based on a record book. The defences provided by the appellant were either not corroborated or did not justify his absence from duty or his failure to record the time of his arrival at and leaving the office.

[54] In the circumstances of this case, we agree with the learned High Court judge's reliance on the decision of the Federal Court in *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573. Although that case was concerned with the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, the manifest intention of reg 35(7) of the Public Officers (Conduct and Discipline) Regulations 1993 as expressed therein, accords with the statement made by Zaki Tun Azmi PCA (as His Lordship then was) in delivering the judgment of the Federal Court in that case, where His Lordship stated:

> [43] I had mentioned in para 22 above, according to GOs 24, 25 and 26, the decision whether to refer a case to a committee of inquiry is the discretion of the disciplinary authority. *In so deciding whether to refer to the committee of inquiry, the disciplinary authority would have to consider the written representation of the respondent i.e, whether his written representation exculpated himself from the charges preferred against him.*
>
> [44] From these GOs*, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself.* (Emphasis added.)

[55] There is then the appellant's contention that he had instructions to work outside office. It was also maintained that there was no inquiry made with his supervisors for further evidence of his work and of the charges against him. No evidence of any specific instructions was provided by the appellant to exculpate himself from the charges in respect of all those occasions that he was found to have failed to report or record as required. In fact, evidence was led from his supervisors but there was little if any specificity in the evidence to justify the appellant's failure to report for duty or record his time of arrival for and departure from work on those specific days that he was found to have failed to do so. That he had to work out of office on occasions was confirmed by his supervisors but there was no justification given for why he had failed to report for work on those occasions that were proven or why he had failed to record his time of arrival and departure from office.

[56] More importantly, and on this finding of fact, the observations of Mohd Saari JCA in *Ang Seng Wan* is pertinent:

It follows, therefore, that the court is not involved in the evaluation of evidence which transpired at the disciplinary proceeding as stated by Abdoolcader J in *Mak Sing Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at p 178:

> Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker v Minister of Health* [1938] 1 KB 655, *Jacob v Attorney General* [1970] 2 MLJ 329).

[57] However, the foregoing must no doubt now be considered with the principle of 'irrationality' in mind. As Lord Diplock explained in *Council of Civil Service Unions*:

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury unreasonableness*' (*Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). It applies to *a decision which is so outrageous in its defiance of logic or of accepted moral standards* that no sensible person who had applied his mind to the question to be decided could have arrived at it. (Emphasis added.)

[58] In light of the foregoing, we are of the view that there was no illegality, procedural impropriety or irrationality demonstrated in respect of the disciplinary proceedings in question, its process or the decision arrived at.

[59] This leaves the issue of proportionality of the sentence meted out to the appellant. Insofar as this issue is concerned, it has to be pointed out that this was not an issue that was raised in the appellant's statement given pursuant to O 53 r 3(2) of the Rules of Court 2012. It would appear to have been an afterthought, having regard to the fact that it was only raised in the appellant's supplementary memorandum of appeal, in paras 15 and 19.

[60] Order 53 rule 3(2), in respect of the statement to be provided when obtaining leave, is couched in mandatory terms. In the *Malaysian Civil Procedure* 2018, Vol I at para 53/3/7 the learned authors state as follows:

> Under Order 53 r 3(2), the application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought (*Dr Dutt v Assunta Hospital* [1981] 1 MLJ 304). *Grounds omitted in the statement cannot be relied upon at the hearing by the applicant, or at the appellate stage.* The principle that a party is bound by his own pleadings applies: *V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors* [2000] 3 MLJ 652; [2000] 1 AMR 2435, CA. There is however power in a judge to grant leave to amend the statement pursuant to r 7. (Emphasis added.)

[61] In *V Paul Raj Chelladurai v Jabatan Telekom (M) Bhd & Ors* [2000] 3 MLJ 652, the requirement that the statement must contain the grounds relied upon was strictly applied by the Court of Appeal. Siti Norma Yaakob JCA (as

Her Ladyship then was) in delivering the judgment of the court, stated as follows:

> Order 53 r 3(1) of the RHC emphasizes the principle that a party is bound by his own pleadings and since that order and rule is mandatory in nature, the omission to plead in the statement the two objections raised before us is sufficient reason for us to hold that this appeal lacks merits and on that conclusion we dismiss it with costs, confirm the order of the High Court and order that the deposit be paid out to the respondents to account of their taxed costs.

[62] The court's decision in *V Paul Raj Chelladurai* was, however, based on the former O 53, under the Rules of the High Court 1980, before its amendment in 2000. The then O 53 r 3(1) expressly prohibits reliance on any grounds not set out in the statement. It provided as follows:

> 3(1) Copies of the statement and of the affidavits in support of the application for leave under rule 1 must be served with the notice of motion or summons under rule 2 and, subject to paragraph (2), *no grounds shall be relied upon or any relief sought at the hearing of the motion or summons except the grounds and relief set out in the said statement*. (Emphasis added.)

[63] This expressed restriction however no longer appears in the current O 53 of the Rules of Court 2012. This does not mean that it is no longer vital to set out the grounds relied upon in the statement to be delivered pursuant to O 53 r 3(2). What in our view it does mean is that the stringency of the former rule no longer exists but similar to the principles relating to pleadings, a valid objection may still be raised, in appropriate cases, against reliance on grounds not set out in the statement.

[64] In the case at hand, no objection was raised by the learned federal counsel against the appellant's reliance on the lack of proportionality in the sentence handed down, which was not set out in the statement. Learned federal counsel, however, did refer to and relied upon the decisions of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153 and *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409.

[65] In the case of *Ng Hock Cheng*, the appellant was a chief storekeeper of the Prisons Department at Kamunting in Taiping, Perak. The appellant had incurred heavy debts and as a result, he became the subject of disciplinary proceedings under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. After considering the appellant's representations, the Public Services Commission dismissed the appellant. The appellant maintained, inter alia, that the punishment of dismissal was too severe in the circumstances. The appellant had served for some 28 years and the debts he had incurred were to help his father.

[66] The question of law posed to the Federal Court in *Ng Hock Cheng* contained two limbs. The first was whether the appellant's dismissal was valid while the second was whether a court had the power to interfere with any punishment meted out. It is the second limb of the question posed that is of specific relevance. On the second limb, Peh Swee Chin FCJ stated as follows, at pp 158–159:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard ... If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. *But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment*.
>
> To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees. (Emphasis added.)

[67] Peh Swee Chin FCJ then went on the state, in p 159, as follows:

> To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.
>
> Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, *in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee*. (Emphasis added.)

[68] The Federal Court, in its decision, also went on to affirm the dissent in the judgment of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771. In *Ng Hock Cheng*, Peh Swee Chin FCJ stated of *Tan Tek Seng*, at pp 157–158, that:

> On appeal to the Court of Appeal, ..., *it was held in a majority judgement — in allowing the appeal — that the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably, and fairly, that if it acted arbitrarily or unfairly or imposed a punishment that was disproportionate to the misconduct, its decision on the punishment was liable to be quashed or set aside*. The Court of Appeal then by a majority substituted the order of dismissal in effect with an order that the senior assistant of the primary school be reduced in rank and salary to those of an ordinary teacher.
>
> *It was held by the dissenting judge that the court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and it was held further*

whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say. (Emphasis added.)

Peh Swee Chin FCJ then went on to state, at p 159, as follows:

Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.

[69] The dissent in *Tan Tek Seng* was by NH Chan JCA in which His Lordship had stated thus:

The test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for us to say. The correct test is: Was it reasonable for the employers to dismiss him? Or, put in another way: Might a reasonable employer reasonably have taken the view that the circumstances or gravity of the misconduct of the employee justified his dismissal? *When considering the reasonableness of what a reasonable employer would have done, the Court* (whether it be the High Court, Court of Appeal or, for that matter, even the Industrial Court) *must not substitute its own views as to what was the appropriate penalty* (for the employee's misconduct) *for the view of the particular employer concerned*. (Emphasis added.)

[70] In the more recent decision of the Federal Court in the case of *Panzana Enterprise*, both the minority decision of NH Chan JCA in *Tan Tek Seng* and the decision of Peh Swee Chin FCJ in *Ng Hock Cheng* were reiterated with approval. In *Panzana Enterprise*, the Federal Court was there concerned with the decision of the Industrial Court in relation to employees in the private sector and the Federal Court held that the doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act 1967. As such the Industrial Court had the jurisdiction to decide whether dismissal was too harsh a punishment in circumstances when ascertaining an award under s 20(3) of the Industrial Relations Act 1967.

[71] The Federal Court in *Panzana Enterprise* however, drew a distinction between employees in the private sector versus public servants. In delivering the judgment of the Court, Raus Sharif PCA (as His Lordship then was) stated of the decision of the Federal Court in *Ng Hock Cheng* and the minority decision in *Tan Teck Seng*:

[26] There is no dispute that the above two cases involved public servants and disciplinary procedures relating to them. It can also be no dispute that by operation of arts 135 and 132 of the Federal Constitution, *a public servant who wishes to challenge any allegation of misconduct against him, for which punishment has been imposed, can only do so by challenging it in the High Court by way of judicial review. The said public servant cannot challenge the punishment imposed, but only on the allegations preferred against him*. (Emphasis included.)

A **[72]** Clearly, the foregoing statement of the Federal Court regarding public servants was obiter dictum as the subject matter before the court concerned a private sector employee and the decision of the Industrial Court. However, the decision of the Federal Court in *Ng Hock Cheng* on the issue of the appropriateness of the punishment in respect of a public servant was not *obiter*.

B

[73] The decision in *Panzana Enterprise* has made it clear that the principle of proportionality is embedded in the Industrial Relations Act 1967. Thus, employees in the private sector would have the benefit of that principle. With the acceptance of the ever-expanding doctrine of proportionality, there now does not appear to be any good reason why the doctrine should not be available to public servants in disciplinary matters especially in respect of the punishment meted out by the Public Services Commission.

C

D **[74]** However, even if the principle of proportionality were to be available for courts to review the punishment imposed on public servants, it would seem reasonable that it should only do so in exceptional cases. Courts should be very slow to deem any punishment meted out in disciplinary cases as being disproportionate. The danger of a court substituting its personal view as to what is or is not proportionate is very real. How strict the public sector wishes to be on matters of discipline may be dependent on many factors and circumstances and the justification may lie in policy developed to confront problems or to address issues that the public sector may be facing and these may not be manifest from the facts of any given case.

E

F

[75] The strictures imposed by the decision of the Federal Court in *Ng Hock Cheng* and its observation in *Panzana Enterprise* aside, we also do not find that appellant's dismissal was unreasonable or obviously disproportionate such as to warrant any interference by the court. To some, the number of days the appellant failed to report or record as required may be relatively small. However, it is in our view enough to betray an irresponsible attitude of indifference to the need for discipline in a person of the appellant's rank.

G

H **[76]** It is important that the court does not, or at the most be circumspect and slow, to impose the weight or importance that the court would have attached to the infractions that the appellant was found to have committed and thereby replace the exercise of the power and discretion of deciding on the punishment to be meted out that is especially conferred, not on the Court, but on the Public Services Commission.

I

[77] Both Hanipah bt Farikullah and Lee Swee Seng JJCA have had the opportunity to consider this judgment in draft and they have expressed their concurrence with it.

CONCLUSION

[78] For the reasons given above, the appellant's appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Dzulqarnain Ab Fatar